(9)

No. 95-129

In The

Supreme Court of the United States

October Term, 1995

EXXON COMPANY, U.S.A.;
EXXON SHIPPING COMPANY,

Petitioners,

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;
HAWAIIAN INDEPENDENT REFINERY, INC.;
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

Respondents,

v.

GRIFFIN WOODHOUSE, LTD.;
BRIDON FIBRES AND PLASTICS, LTD.,

Third-Party Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITIONERS' REPLY BRIEF ON THE MERITS

Petitioners Exxon Company, U.S.A. and Exxon Shipping Company (collectively "Exxon") reply to respondents' briefs on the merits. The HIRI respondents' brief is abbreviated herein as "HRB"; the brief of the third-party respondents and of Sofec is abbreviated herein as "TPB."

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Respondents' briefs fail to acknowledge the fundamental issues of admiralty policy presented by this case: Under what circumstances will admiralty defendants be relieved of all liability for marine casualties that are caused in fact by their tortious conduct or by their breach of warranty? Those policy questions are decided by asking what results admiralty law should try to achieve. When the objectives are identified, legal policy is shaped to achieve them, and the resulting law is thereupon applied to the particular case before the Court. The case is the vehicle for the Court's stating admiralty law, but the case is the medium, not the message.

The Court has already identified the objectives that general admiralty law seeks to achieve: promoting maritime safety, deterring wrongdoing most likely to injure others, achieving fundamental fairness, preserving the simplicity that is a characteristic of general admiralty law, and striving for uniformity. *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. ___, ___, 115 S. Ct. 2091, 2095, 132 L.Ed.2d 148, 154 (1995); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 405 n.11, 409, 95 S. Ct. 1708, 1713 n.11, 1715, 44 L.Ed.2d 251, 259 n.11, 261 (1975); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, 376 U.S. 315, 324, 84 S. Ct. 748, 754, 11 L.Ed.2d 732, 741 (1964); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631, 79 S. Ct. 406, 410, 3 L.Ed.2d 550, 555 (1959).

The policy questions before the Court are thus: Will owners of dangerous berths and suppliers of extra-hazardous equipment be encouraged to make them safer if they know that they can avoid all liability for marine casualties to which they contributed by blaming the entire loss on navigational ineptitude of masters of endangered vessels? Will masters become better navigators if they know those who furnish unsafe berths and dangerous equipment will escape all liability for their wrongdoing that was a cause-in-fact of the injury if the defendants can convince a trial court that the master's navigation of the vessel was grossly negligent? Is it fair to impose the whole loss of vessels on shipowners if their masters respond very negligently to dangers that they would never have had to face but for defendants' misconduct? The answer to each question is "no."[1]

Allocating marine losses on the basis of the degree of fault of each of the actors in the drama is fair and simple to understand. Common-law legal policies labeled "proximate cause," including superseding cause, are difficult for tort scholars to explain, let alone for shipowners and seafarers to understand and to apply. *E.g.*, W. Keeton, et al., *Prosser and Keeton on the Law of Torts* § 42-45 at pp. 272-321 (5th ed. 1984) (hereafter *"Prosser and Keeton"*). Respondents have given no sound reasons why this Court should import the confusing maze of common-law proximate cause concepts into general admiralty law when comparing degrees of fault that contribute to marine injuries is so much fairer and simpler.

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[1] As the Court knows, ships' captains make their navigational choices with abiding regard for the perils at sea and deep concern for the safety of the ship and the crew, not by pondering what may happen in a courtroom months or even years later. Businessmen running oil refineries and suppliers of marine equipment are far more likely to make choices of conduct based on assessments of the risks of future litigation and liability than are seafarers.

Like common-law plaintiffs, admiralty claimants must carry their burdens of proving that defendants' torts or breaches of contract were causes-in-fact and legal causes of the losses for which they seek recovery. However, the policy reasons for imposing or refusing to impose limitations of liability under legal cause doctrines are not identical in the two situations because the concerns of admiralty courts and the context of the maritime losses are not the same as those ashore.

Respondents' contention that they did not concede that their unspecified wrongdoing was a cause-in-fact of the stranding is not supported by the record. (HRB at p. 16.)[2] Respondents necessarily made that concession because the superseding cause doctrine, which they persuaded the district court to accept to grant their bifurcation motion, is not even relevant unless it is first established that the defendant's misconduct was a substantial factor in producing the injury; otherwise a defendant has no liability for the superseding cause doctrine to limit. (*Prosser and Keeton, op. cit. supra*, § 42 at pp. 272-73.) *Prosser and Keeton* explains that the effect of intervening forces presents "a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal responsibility." (*Prosser and Keeton, op. cit. supra*, § 44 at p. 301.)

Dissatisfied with the questions presented upon which the Court granted *certiorari*, respondents have chosen to present and argue different questions. (HRB at p. i; TPB

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[2] In arguing respondents' bifurcation motion, counsel for Bridon Fibres said: "Now the Court is absolutely right that but for the breakout there wouldn't have been the grounding in this case, but for – but that's not enough for proximate causation." 7/27/92 RT 31.

at p. i.) They vigorously attack points that Exxon has not raised and misstate the contentions that Exxon has made.

Contrary to respondents' briefs, Exxon has not recited any version of the events that is contradicted by the district court's findings.[3] (HRB at 13.) The facts stated by Exxon are fully supported by the record and by the district court's findings of fact. Respondents' quarrel with Exxon's recitation of the facts boils down to umbrage that Exxon's brief called the responses of Captain Coyne and the crew of the tanker "heroic". The description is apt, even accepting the district court's conclusion that the Captain was grossly negligent. How many heroes are careful?

Exxon *has* attacked the district court's erroneous conclusions of law, which respondents often cite as if they were findings of fact. (*E.g.*, HRB at 13-14.) Respondents contend that Exxon's statement that the captain and the crew of the tanker were "valiantly dealing with a whole succession of emergencies" contradicts the district court's factual findings. (HRB at 15.) In support of that argument, respondents quote conclusions of law and a statement from the Ninth Circuit's opinion that is contradicted by the record. (HRB at 15-16.) Respondents' vituperative attack on Exxon's statement that the captain had no reason to "anticipate that the tanker would be anywhere near the stranding area until the whole chain of events occurred after the chain parted" is likewise supported by the record. The captain knew where the vessel was; he had no reason to predict that it would be far from the supposedly safe berth until the series of emergencies occurred after the SPM failed.

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[3] Exxon did not attack the findings in the court of appeals because they were made on sharply conflicting evidence; an appellate attack would have been futile. Such an attack would be irrelevant here because this Court does not sit as an error correcting court.

The basic premise of respondents' arguments is that the district court factually found that the tanker had escaped the perils created by their conduct not later than 1830 and even as early as 1803. (*E.g.*, HRB at pp. 14-15; TPB at p. 35.) Respondents rely on the district court's legal conclusions, and the court's legal conclusions are inconsistent with its factual findings. Thus, the court found that while the cargo hose was suspended from the crane, it caused the crane to collapse at 1944 injuring the crane operator. (Findings 64, 66, JA 156.) It also found that Captain Coyne commenced the final turn at 1956. (Findings 74, JA at p. 157.) HIRI's mooring master and crewmen of the tanker would never have had to spend over an hour to unbolt the dangerous cargo hose from the ship's manifold (Findings 64, JA 156), nor would the NENE have had to keep trying to prevent the hose from moving under the tanker throughout the ordeal, nor would the crane have collapsed if the chafe chain had not parted, the hoses had not broken, the hoses had been equipped with safety devices and adequate tug assistance had existed. The evidence was uncontradicted that when the crane collapsed, the boom began sweeping the tanker's deck creating imminent danger of serious injuries to the deck crew and destruction of the vessel by explosion. (2/18/93 RT 25-26.) The absence of any findings of fact by the district court on that point does not change the record: The trailing cargo hose presented a continuing danger to the tanker from the time it broke to the crane's collapse through the efforts to secure the boom – *i.e.*, less than 12 minutes before the tanker commenced its turn at 1956.[4]

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[4] The statement in the Ninth Circuit's opinion upon which respondents rely to claim that the tanker was out of danger by 1803 (HRB at 15) is contradicted by the record, as well as by the district court's finding that the hose caused the crane to topple at 1844.

Even if the doctrine of superseding cause had been incorporated into general admiralty law, it would not have relieved respondents of liability because the risk of stranding the EXXON HOUSTON (and every other tanker that moored at the SPM) was a foreseeable hazard created by respondents' torts and breaches of admiralty warranties. (*E.g., Prosser and Keeton, op. cit. supra,* at pp. 303-306.) When the harm that happened is within the risks that a defendant foresaw or that his duties to the plaintiff required him to foresee, the fact that the harm came about in an unforeseen way does not limit or defeat liability. *E.g., Restatement (Second) of Torts,* (hereafter *"Restatement"*) §§ 281, 433, 435, 441, 442B, 450, 451 (1965). "[T]he effect of intervening forces . . . [presents] a 'hazard problem' rather than a problem of causation," (*Id.* at § 281, cmt. h); *Prosser and Keeton,* §§ 43, 44 at pp. 289-299, 316.

To prove that a particular casualty was or should have been foreseen by a defendant and was within the risks created by defendant's wrongs, a plaintiff must be permitted to present proof of the duties that the defendant involuntarily or voluntarily assumed, the risks created by the breaches of those duties, and the culpability of those breaches. *E.g., Prosser and Keeton, op. cit. supra,* § 43 at pp. 280-84. By preventing Exxon from proving its case-in-chief, the court foreclosed the evidence that would have destroyed respondents' foreseeability and superseding cause arguments. Respondents' briefs misconceive Exxon's arguments, and therefore miss the points. (HRB at 44-45, 47-50; TPR at 46-49.)

Contrary to respondents, Exxon's due process argument is not based solely on the district court's bifurcation order. (HRB at pp. 43-45.) The district court did abuse its discretion in granting respondents' bifurcation motion because legal cause cannot be correctly tried by excluding evidence to prove the extent of defendants' duties to plaintiffs and the risks created by breaches of those duties. The bifurcation motion, *plus* the court's later rulings foreclosing Exxon from presenting its evidence on

those very points, *plus* the entry of judgment against Exxon on Phase I created the constitutional issue. The district court not only tried the case backwards and upside-down, it prevented Exxon from trying its liability case at all. The issues of liability on which the Court granted *certiorari* were intertwined with the due process issue; accordingly the due process point was within the questions presented.

Stranding the tanker was a foreseeable consequence of respondents' breaches of their express and implied admiralty warranties. The failure of the tanker's captain to prevent the casualty is an issue that affects damages, not liability, and the damage issues were never tried.

ARGUMENT

I. EXONERATING RESPONDENTS FROM ALL LIABILITY IN TORT FOR THE LOSS OF THE TANKER IS INCONSISTENT WITH THE COURT'S ADMIRALTY POLICIES THAT IMPELLED IT TO ADOPT COMPARATIVE FAULT

The Court's general admiralty policies in tort cases are explicit in *Kermarec,* 358 U.S. at 631, and *Reliable Transfer,* 421 U.S. at 405, n. 11: (1) common-law tort doctrines are not imported when they are not simple and practical in the marine context; and (2) the legal principles that are adopted in admiralty, whether in negligence, strict product liability in tort, or breach of admiralty warranties, must be fair and have the effect of imposing liability on the parties best able to protect persons and property from failures of hazardous equipment and to deter wrongful behavior that is most likely to harm others. *Accord: East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 865-866, 106 S. Ct. 2295, 2299,

90 L.Ed.2d 865, 873-74 (1986); *Italia Societa per Azioni di Navigazione*, 376 U.S. at 323-324 (1964).[5]

Respondents are simply mistaken when they argue that "[n]either this Court nor any other sits to enforce illusory standards like 'deterrent effect' or 'best situated.' " (HRB at p. 30.) They confuse public policy doctrines with the law that emerges to enforce them. Respondents propose that the common-law doctrines of legal cause, including superseding cause, should be imported wholesale into admiralty because those doctrines (as respondents have chosen to interpret them) would reduce admiralty defendants' liability, shorten discovery, pre-trial and trial time, and harmonize American general admiralty law with the Brussels Convention[6] and British law. Respondents' proposal cannot be reconciled with existing admiralty policy; since *Reliable Transfer*, general admiralty law pronounced by this Court is in harmony with the Brussels Convention

[5] Referring to strict liability for unseaworthiness and strict liability for breach of implied warranty of workmanlike service, the Court explained in *East River Steamship Corp.*: "The Court's rationale in those cases – that strict liability should be imposed on the party best able to protect persons from hazardous equipment – is equally applicable when the claims are based on products liability. [Citations omitted.] And to the extent that products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law. [Citing *Kermarec*]." 476 U.S. 858, 866.

The Court held that strict product liability in tort would not lie in admiralty when a defective product manufactured by the defendant malfunctioned and injured only the product itself. Thus, the holding of the case is not relevant here, but the admiralty policies expressed are applicable in our case.

[6] The International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, signed at Brussels on September 23, 1910. The Convention was reprinted in 8 N. Singh *International Conventions of Merchant Shipping* 1337 (2d ed. 1973).

and with British admiralty law, except that, in Article 6, the Brussels Convention abolished all legal presumptions of fault in regard to liability for collision.

The objectives of general admiralty law are not to relieve wrongdoers from their aliquot shares of the losses from marine casualties caused in fact by their misconduct, nor to discourage meritorious litigation, nor to avoid the necessity of proving elements of liability or damages that may be time consuming. Rather, admiralty policies are intended to reach results that are equitable and, at the same time, that will deter wrongful conduct and will increase the safety of persons and property in the maritime industry. *See, e.g., Reliable Transfer*, 421 U.S. at 407; *East River Steamship Corp.*, 476 U.S. at 866.

Wholesale adoption of common-law proximate cause legal principles into the law of admiralty has nothing to recommend it as the Court explained in *Kermarec*. Proximate cause concepts developed by common law are anything but simple and uniform. As *Prosser & Keeton* aptly observe:

> This connection [between a defendant's act and plaintiff's injury] usually is dealt with by the courts in terms of what is called "proximate cause," or "legal cause." There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. *Id.* § 41 at p. 263.

Actual causation is always a question of fact. Legal cause, however, is an expression of social policy whereby defendants' liability is sometimes limited because the circumstances that combine to produce plaintiffs' injury are remote from the risks entailed by defendants' misconduct.

Since the adoption of the British Maritime Conventions Act of 1911 (1 & 2 Geo. V, C. 57), British admiralty law substantially adopted the Brussels Convention.

Under British law, as here, comparative fault is not applied when only one of the actors in a marine casualty committed a wrong that was causally related to the loss; but when more than one actor's misconduct contributes to the loss, the parties must bear the loss in proportion to the degree of the fault of each. Under British law, as here, both the culpability of the misconduct of each of the actors and the extent to which the fault of each contributed to the loss (irrespective of its blameworthiness) must be taken into account. *The Statue of Liberty*, 2 Lloyd's List L.R. 277, 282 (1971); *The Miraflores & The Abadesa*, 1 A.C. 826, 845 (1967) (in determining the degrees of fault to be compared, "[t]he investigation is concerned with 'fault' which includes blameworthiness as well as causation. And no true apportionment can be reached unless both factors are borne in mind").

Respondents misunderstand the role of this Court when they argue that "[n]either this Court nor any other sits to enforce illusory standards like 'deterrent effect' or 'best situated' " (HRB at p. 30). The Court *does* establish admiralty policy, and it formulates general admiralty law to achieve the public policy goals that it has identified. Respondents have simply chosen to disregard the admiralty policies that the Court has adopted and have urged the Court to adopt different policies more to their liking in this case.

Contrary to respondents' arguments, this case cannot be effectively distinguished from *Reliable Transfer* and *City of Milwaukee*, even assuming that Captain Coyne was grossly negligent. The captains of the plaintiffs' vessels in both of those cases were grossly negligent.

In *Reliable Transfer*, the shipowner sought damages from the government for the stranding of its tanker because the Coast Guard had negligently maintained a breakwater light. The tanker captain knew that the light was not working on the night that the tanker grounded on a sand bar outside New York harbor. Although the

tanker was equipped with radar, navigation charts and other instruments, the captain used none of them in navigating the tanker. Mistakenly believing that he was heading out to sea, the captain ordered the tanker to make a 180-degree turn when the tide was at flood and a severe storm was causing rough seas. The district court concluded that the tanker would not have stranded but for the non-functioning of the breakwater light, and it found that the tanker captain was 75 percent at fault for the stranding and the Coast Guard's negligence was 25 percent of the fault.

On appeal, the government argued that the Coast Guard's negligence was not a cause of the stranding. The Second Circuit disagreed because "[s]urely it was a but-for cause." *Reliable Transfer Co., Inc. v. United States*, 497 F.2d 1036, 1038 (2d Cir. 1974). The Second Circuit described the government's causation argument as "essentially a variation of the last clear chance doctrine" and rejected it. *Ibid*. The court recognized that it was manifestly unfair to have to divide damages fifty-fifty when the tanker owner was seventy-five percent at fault for the stranding, but until this Court overturned the divided damages rule, the Second Circuit was bound by it.

This Court accepted the Second Circuit's implied invitation to correct the unfairness of the divided damages rule in *Reliable Transfer*. The case was an appropriate vehicle for adopting comparative fault because more than one actor's wrongdoing contributed to the casualty (as is true in our case).[7]

Respondents' reliance on *Union Oil Co. of Cal. v. The San Jacinto*, 409 U.S. 140, 93 S. Ct. 368, 34 L.Ed.2d 365

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[7] *City of Milwaukee*, 515 U.S. ___, 132 L.Ed.2d 148, followed *Reliable Transfer* in apportioning fault between the less negligent City and a grossly negligent shipowner.

(1972) is seriously misplaced. (TPB at pp. 23-24.) Although more than one party was involved in that collision between a barge and a tanker on the Columbia River, only one of the parties was at fault, and, therefore, *The San Jacinto* could not be a vehicle for replacing divided damages with comparative fault. The barge was being hauled by a tug down the Columbia River when the tanker was proceeding upstream. After the tug entered fog on its side of the river, the tug captain mistakenly thought he saw range lights indicating an imminent collision. He caused the tug to make a U-turn putting the vessels on a collision course. Although the tanker captain ordered her full astern when the tug was sighted at a distance of 900 feet, the tanker could not move backward fast enough to escape the towed barge which thereupon crashed into the port bow of the tanker driving her aground. The district court held that the tug was solely at fault. The Ninth Circuit reversed, in part, holding that the tanker captain was also negligent because he had violated a regulatory maritime duty and was therefore presumptively negligent under *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874). This Court reversed because the regulatory rule upon which the Ninth Circuit relied was not applicable under the circumstances of the case. Because only one party was negligent, all the loss had to be borne by the tug. The Court explained:

> "The District Court's finding that any negligence on the part of the Santa Maria [the tanker] did not "proximately [contribute] to the collision" was but another way of saying that fault based on the half-distance rule must have some relationship to the dangers against which that rule was designed to protect. Here it did not." [First bracketed language added; second bracketed word in original.]

409 U.S. at 146.

In our case, the district court foreclosed Exxon from offering its evidence which would have proved that Captain Coyne's negligence under the circumstances was slight as compared with the egregious breaches of duty that the respondents voluntarily assumed or were required to assume as a matter of law.[8]

II. IF THE COURT HAD INCORPORATED COMMON-LAW SUPERSEDING CAUSE INTO GENERAL ADMIRALTY LAW, RESPONDENTS WOULD NOT THEREBY ESCAPE LIABILITY

The district court recognized that one of the hazards created by the breakout was grounding (Conclusions 45a, JA 175) and that "the breakout was a cause-in-fact of the stranding." (Conclusions 7, JA 162.) The court went legally astray because it decided that respondents' torts, no matter how culpable, could not be a legal cause of the stranding unless " 'the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of grounding. *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982).' " (Conclusion 8, JA 162.)[9] The court misconceived and misapplied common-law legal cause. Section 442B of the *Restatement* states the applicable principles:

> Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the

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[8] The Court's foreclosure of Exxon's evidence is the basis of the due process issue discussed *infra* at pp. 15-16.

[9] *Hahn* is not in point. It was a wrongful death action brought by a private aircraft pilot under the Federal Tort Claims Act on the theory that the government's failure to install warning lights on its power line caused the aircraft to strike the line. The district court held that the government had no liability because the absence of warning lights was not a cause-in-fact of the casualty.

> fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Because misconduct of the respondents *did* create the risk of stranding and *was* a substantial factor in causing that harm, Captain Coyne's gross negligence did not become a superseding cause of the stranding.[10]

The district court's holding that Captain Coyne was solely at fault for the stranding because the danger of stranding created by respondents' torts had ended at 1830 (Conclusion 46, JA 175-75) is in conflict with its findings that the cargo hose caused the crane to collapse injuring the crane operator at 1944 – just 12 minutes before the tanker commenced the final turn. (Findings 64, 74, JA 156-57.) Respondents created the legal cause chain before the HOUSTON left the mainland because the berth was not safe, the SPM and its equipment and the cargo hoses were dangerously defective, and respondents had taken none of the safety measures that were required to make the berth and the equipment safe. The cargo hoses would not have broken if the chafe chain had not parted. The cargo hose would not have trailed and imperiled the tanker if the safety devices on the hoses had not been removed. The parting of the chafe chain and the cargo hoses would not have seriously endangered the tanker and her crew if respondents had taken any of the safety measures that had earlier been recommended or that the Coast Guard required the HIRI respondents to undertake

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[10] The Second Circuit correctly stated the common-law principles in Judge Friendly's lucid opinion in *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert. denied sub nom., Continental Grain Co. v. City of Buffalo*, 380 U.S. 944, 85 S. Ct. 1026, 13 L.Ed.2d 963 (1965).

after the HOUSTON's stranding. HIRI's mooring master and the tanker's crew would not have had to take over an hour to remove the bolts affixing the trailing cargo hose to the tanker's manifold if the prior misconduct had not happened. The hose would not have caused the crane to collapse injuring one of the crewmen and threatening the lives of the deck crew and the tanker itself if the chafe chain had not parted. To relieve respondents of all liability for the casualty under these circumstances does not make common sense, let alone admiralty sense.

III. THE DUE PROCESS ISSUE IS FAIRLY ENCOMPASSED BY THE QUESTIONS PRESENTED

Contrary to respondents' arguments (HRB at pp. 43-45), Exxon's constitutional attack is not founded solely on the bifurcation order. Constitutional deprivation was begun by that order, but it was completed by the district court's subsequent exclusionary orders and ultimate judgment that foreclosed Exxon from ever proving its liability case-in-chief.

The respondents persuaded the district court that it could properly split the issue of legal cause by first trying the Captain for everything that happened *after* the breakout in Phase I. Only after Phase I was tried and decided would Exxon be permitted (if ever) to introduce any of its abundant evidence about the events and conduct of the respondents that occurred *before* the breakou[illegible] Over Exxon's vehement objection, the court granted respondents' bifurcation motion, and, pursuant thereto, it foreclosed Exxon from introducing any of its evidence to prove the scope of the duties that each of the respondents owed Exxon in their various roles as warrantors of safe berth (the HIRI respondents), as wharfingers (the HIRI respondents), as designers, vendors, or furnishers of extra-hazardous marine equipment and as implied warrantors of the quality of marine services supplied to

Exxon (all respondents). The court also foreclosed all of Exxon's evidence about the breaches of those duties and the culpability of the respective respondents' conduct. Legal cause could not be correctly decided without the evidence that the district court foreclosed. Phase II was never tried because the court entered judgment against Exxon at the conclusion of Phase I.

The question whether a defendant should be relieved of liability, in whole or in part, for a casualty to which his own conduct contributed cannot be decided by permitting only one piece of the legal cause puzzle to be tried. To do so violates the due process principles stated in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L.Ed. 1188 (1931). Those principles are not confined to jury trials. (HRB at p. 48.) The same fair trial principles apply in non-jury cases. *See, e.g.*, 6A J. W. Moore et al., *Moore's Federal Practice* ¶ 59.06 (2d ed. 1995) (applying the same concepts to determine whether a new trial may be ordered in jury and non-jury cases with respect to less than all of the issues in a case).

Respondents argue that cutting legal cause in two and foreclosing all evidence on the severed part did not deny Exxon a fair trial because an "extraordinary lapse of time" distanced respondents' wrongdoings from the stranding. (HRB at p. 49.) As the district court's own findings established, however, the time that elapsed from the moment the crane collapsed to the tanker's commencing its final turn was twelve minutes. In the meantime HIRI's mooring master and crewmen of the tanker were trying to unbolt the cargo hose; Captain Coyne and his deck crew, together with the crew of the NENE, were constantly struggling with the dangers to both vessels posed by the trailing cargo hose, the storm and the darkness. To argue that all of those difficulties were severable from respondents' serious breaches of duty to Exxon is to ignore reality as well as basic principles of legal cause.

IV. RESPONDENTS CANNOT ESCAPE LIABILITY FOR BREACHES OF WARRANTY BECAUSE THE CAPTAIN WAS GROSSLY NEGLIGENT

Respondents' arguments on Exxon's claims for breach of express and implied admiralty warranties thoroughly confuse issues relating to liability with those relating to damages, and they misread the authorities upon which they rely. (HRB at pp. 32-38; TPB at pp. 40-45). To establish liability for breach of contract, it is, of course, necessary that the plaintiff prove that there is a causal connection between the breach and an injury from the breach. Both the fact of injury and the fact that the injury would not have happened but for respondents' wrongdoing was established here, as the district court found. No more is required to prove liability for respondents' breaches of warranty. Respondents' arguments are relevant only with respect to damages for breach of contract, as the very authorities cited by respondents make clear.

Unless changed by statute, the rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 45 (1854) is still the accepted doctrine for limiting damages recoverable for breach of contract: General damages are usually confined to those which would naturally arise from the breach or which might have reasonably been contemplated or foreseen as the probable result of the breach by both parties at the time they made their contract. If special circumstances caused some unusual injury, damages for that injury are not recoverable unless the circumstances were known or should have been known to the guilty party at the time he entered the contract. *E.g.*, 5 A. Corbin, *Corbin on Contracts*, §§ 1006 *et seq.* (1964).

The doctrine of avoidable consequences is applied only to ascertain the amount of recoverable damages; it is irrelevant to the issue of liability. That is the very point made by authority respondents have cited. (HRB at p. 34.)

E.g., Pennzoil Producing Co. v. Off-Shore Express, Inc., 943 F.2d 1465, 1474 (5th Cir. 1991) (the doctrine of avoidable consequences is a rule of damages; "as such it stands wholly apart from the rules that determine who is at fault for the initial injury"); *Delta Transload, Inc. v. M/V Navios Commander*, 818 F.2d 445, 452 (5th Cir. 1987) (defendant could not argue the doctrine of avoidable consequences in the liability phase of the action to recover for loss of a marine buoy damaged by defendant's vessel because the doctrine " 'is not considered a defense at all, but merely a rule of damages by which certain particular items of loss may be excluded from consideration'. [Citation omitted.]"); *Federal Ins. Co. v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 350 (2d Cir. 1986) (the doctrine of avoidable consequences is not a defense; it applies only to a diminution of potential damages, not to the existence of a cause of action); *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 932-33, *modified and rehearing denied*, 604 F.2d 13 (5th Cir. 1979) (the doctrine is merely a method of apportioning damages when, *after* harm has been inflicted, the injured party has failed to exercise reasonable care in mitigating his loss).[11]

Respondents cannot successfully argue that the risk of stranding was not foreseeable at the time respondents gave Exxon their express and implied warranties. (TPB at p. 41.) No powers of Cassandra were required for respondents to foresee that the stranding of tankers was likely when the SPM and its allied equipment failed, particularly under the severe weather conditions that existed

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[11] *Pennzoil Producing Co.* correctly explains the avoidable consequences doctrine: "In order to successfully invoke the doctrine of avoidable consequences to limit a plaintiff's recovery, the defendant must show both 1) that the plaintiff has acted unreasonably after the injury has occurred, and 2) that the plaintiff's unreasonable actions aggravated his damage." 943 F.2d at 1475.

when Exxon's tanker was moored at the defective SPM. The district court acknowledged that reality.

Contrary to respondents argument (HRB at p. 32), the admiralty principles stated in *Italia Societa* and *East River Steamship Corp.* are equally applicable here. To be sure, the defendant in *Italia Societa* was a stevedore that furnished dangerous equipment that injured a longshoreman, and, in our case, the respondents who furnished the dangerous equipment acted in different capacities, but those distinctions make no legal difference in this case.

Exxon is entitled to recover its monetary loss caused-in-fact by respondents' breaches of warranties, just as that shipowner in *Italia Societa* was entitled, by implied indemnity, to recover its monetary loss occasioned by its having to pay for the longshoreman's injury that was caused by the defendant's breach of warranty. Ours is a stronger case than *Italia Societa* because in that case the stevedore was not negligent in supplying the defective equipment. Here, as in *Italia Societa* and *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed.2d 491 (1958), the negligence of a shipowner or the unseaworthiness of its vessel is not fatal to its recovering damages from the furnisher of unsafe equipment for breach of contract. The admiralty policies that underlie the court's imposition of liability in *Italia Societa* are also applicable here:

> [L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

376 U.S. at 324. Respondents, not Exxon, had the power to control the equipment that failed, and HIRI, not Exxon, had the power to make the berth safe, as HIRI had expressly warranted.

CONCLUSION

Exxon respectfully requests that the judgment be reversed with directions to the Ninth Circuit to remand the case to the district court for a new trial.

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Respectfully submitted,

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